

No. 35147-5-III

(Douglas County Superior Court No. 16-1-001576)

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON

Respondent.

v.

VICTOR A. VALDOVINOS-VAZQUEZ

Appellant,

APPELLANT’S AMENDED OPENING BRIEF

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VICTOR A. VALDOVINOS-VAZQUEZ
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I. INTRODUCTION

This action arises out of the trial court's denial of the Appellant's Motion to Vacate his Conviction based on ineffective assistance of counsel. The Appellant's criminal defense counsel failed to meet the constitutional standard of competence for advice about the immigration consequences of Appellant's guilty plea. The Appellant would not have agreed to the plea but for his trial counsel's deficient performance and thus was prejudiced. Therefore, he meets his burden to establish ineffective assistance of counsel and his conviction should be vacated.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in denying Mr. Valdovinos-Vasquez's Motion to Vacate Conviction.
2. The Superior Court erred in holding that Mr. Valdovinos-Vasquez failed to meet his burden to establish that his trial counsel provided ineffective assistance of counsel.

III. STATEMENT OF THE CASE

On August 1, 2016, the State through the Douglas County Prosecutor's Office filed a criminal Information against Appellant Mr. Valdovinos-Vasquez alleging one count of residential burglary. CP 1. Attorney Nicholas Yedinak filed a Notice of Appearance in the case for Mr. Valdovinos-Vasquez on August 10, 2016. CP 188. Mr. Valdovinos-

Vasquez entered a plea of not guilty to the charge at his arraignment on August 15, 2016. CP 188.

Mr. Valdovinos-Vasquez is not a U.S. citizen. CP 37. He entered the United States as a child in or before 2005. CP 62. His family retained attorney Brent De Young shortly after the August 1, 2016 Information was filed to provide immigration consequences advice to Mr. Valdovinos-Vasquez and to consult with Mr. Yedinak for the same purpose. CP 141. On September 1, 2016, Mr. De Young received an email from Mr. Yedinak outlining the terms of a proposed plea deal on the residential burglary charge. CP 141. Mr. De Young offered specific language to Mr. Yedinak that should be used in the plea documents. CP 141. Mr. De Young informed Mr. Yedinak in a telephone conversation that he was aware of an unfiled drug possession charge that could have negative immigration consequences. CP 141.

A plea hearing on the residential burglary charge took place on September 6, 2016. VRP, p. 3. On that same day, the State filed an Amended Information adding two additional charges against Mr. Valdovinos-Vasquez: Theft in the First Degree and Possession of a Controlled Substance. CP 3-5. At the plea hearing, the State informed Mr. Yedinak of the additional pending charge of possession of methamphetamine and proposed to include that charge in the plea deal with no additional jail time. VRP p. 3, ll. 9-24; p. 4, ll. 1-16. Mr. De

Young was not present at the hearing. VRP, p. 3. The hearing was recessed for over three hours so that Mr. Valdovinos-Vasquez could be present in the court room. VRP p. 6, line 20. Mr. Yedinak did not contact Mr. De Young to inform him that the drug possession charge would be added to the plea deal. CP 47. Mr. Yedinak did not provide the amended, final plea agreement to Mr. De Young or consult with Mr. DeYong regarding the immigration consequences of the new charge. CP 141.

Mr. Valdovinos-Vasquez appeared in court in the afternoon of September 6, 2016 and gave the following testimony:

THE COURT: Please state your full name, sir.

DEFENDANT: Victor Valdovinos – Vazquez

THE COURT: Your date of birth?

DEFENDANT: 10/13/95

THE COURT: Sir, I have in front of me a statement of Defendant on plea of guilty. Is that your signature that appears on page 11?

DEFENDANT: Yes.

THE COURT: Did you read the entire document?

DEFENDANT: Yes.

THE COURT: Did Mr. Rosa read that entire document to you in Spanish?

DEFENDANT: Yeah.

THE COURT: Do you fully understand the Spanish language?

DEFENDANT: Yeah

THE COURT: Did you have an opportunity to talk about this document with your attorney?

DEFENDANT: Yeah.

THE COURT: Do you understand all of the rights contained in that document, the elements of the offense you're pleading guilty to and all other paragraphs and provisions?

DEFENDANT: Yes.

THE COURT: I also have in front of me a notice regarding immigration consequences. Is that your signature on that document?

DEFENDANT: Yes.

THE COURT: And did Mr. Rosa read that entire document to you in Spanish?

DEFENDANT: Yeah.

THE COURT: And did you read that entire document?

DEFENDANT: Yep.

THE COURT: And did Mr. Rosa read that entire document to you in Spanish?

DEFENDANT: Yeah.

THE COURT: Do you understand all of rights concerning immigration consequences?

DEFENDANT: (no audible response)

THE COURT: You understand that, sir?

DEFENDANT: Yes.

THE COURT: Are there any that you are aware of, Mr. Yedinak?

MR. YEDINAK: Yes, there are –

THE COURT: Okay.

MR. YEDINAK: -- and I've been in -- Well, for the record I have been in contact with his immigration attorney and, and have advised my client with regards to that, so...

THE COURT: Okay. Do you understand that, sir?

DEFENDANT: Yes.

THE COURT: Okay. Does that indicate that he will be deported or possibly will be deported?

MR. YEDINAK: He's in the proc (sic) -- There's a immigration hold right now. If the Court follows this agreement, he'll have credit for the time that's being recommended and he'll be transported to Tacoma where he'll have a hearing and find out what happens.

THE COURT: Okay. And you do understand, sir, that as a result of this plea that you may well be deported?

DEFENDANT: Yeah.

THE COURT: Okay. Do you feel like you need to speak to another immigration attorney?

DEFENDANT: Yeah.

MR. YEDINAK: No, the question is would you like more time to speak to another attorney?

DEFENDANT: Oh, no.

THE COURT: All right. And, sir, do you understand all of the rights contained in that document, the elements of the offense you're pleading guilty to and all other paragraphs and provisions?

DEFENDANT: Yes.

VRP, pp. 7-11.

Mr. Valdovinos-Vasquez entered a Statement of Defendant on Plea of Guilty. CP 6-16. Mr. Valdovinos-Vasquez also signed a Notice Regarding Immigration Consequence on that day. CP 29.

Mr. Valdovinos-Vasquez filed a Motion and Affidavit to Vacate Conviction and the Statement of the Defendant Victor A. Valdovinos-Vazquez on November 17, 2016. CP 32-38. In Mr. Valdovinos-Vasquez's sworn statement, he testified that when he agreed to the amended guilty plea he believed that his immigration attorney, Mr. De Young, had reviewed the amended plea agreement and that none of the convictions would result in deportation. CP 37, ¶5. Mr. Valdovinos-Vasquez would not have agreed to the plea deal if he had known that Mr. De Young had not reviewed and approved it. CP 37-38.

Mr. Yedinak filed a Declaration stating that "[s]ince Mr. Valdovinos had hired Mr. De Young, specifically for the purpose of advising him regarding immigration consequences, I did not provide any independent specific immigration advice" other than "he should consult with Mr. De Young if he was not completely certain regarding his specific immigration consequences" and "a plea to this additional charge **may adversely affect his immigration status.**" CP 46-47, ¶ 9. Mr. Yedinak also testified in open court on December 19, 2016. VRP, p. 18. In response to Mr. De Young's question "[d]o you ever recall asking Mr.

Valdovinos about his specific status here in this country,” Mr. Yedinak stated the following:

I don’t recall. I’m sure I probably did, but I don’t know for sure without looking at my notes.

VRP p. 21, ll. 13-24.

Mr. De Young subsequently followed up with Mr. Yedinak regarding his “notes,” and the only pertinent note Mr. Yedinak found was one with Mr. De Young’s name and phone number on it and that he wrote “ICE hold – has lawyer” on the inside cover of his file. CP 69.

Mr. Yedinak further testified at the December 19th hearing as follows:

Q: And, to your mind, what are the specific immigration consequences of a drug offense for a non (unintelligible) permanent resident?

A: I think it depends. I’m not sure.

Q: Okay. Did you inform Mr. Valdovinos of the specific consequences of pleading guilty to drug possession?

A: Specific?

Q: Yes.

A: What do you mean by specific?

Q: Did you –

A: Yeah, I informed him that there could be immigration consequences –

Q: Okay.

A: - - but I didn't give him specific what would happen.

Q: Okay. Did you inform him that he would be deported if he pleaded guilty to drug possession?

A: I did not say that to him.

VRP p. 22, ll. 2-22.

Mr. Valdovinos-Vasquez submitted a Second Declaration dated January 16, 2017 providing the following information:

1. He believed that Mr. De Young had worked on and approved the plea agreement;
2. Mr. Yedinak never told him that he would be deported if he plead guilty to the drug possession charge; and
3. Mr. Yedinak never reviewed the police report with him related to the drug possession charge and never discussed the chance of fighting that charge.

CP 61-62, ¶¶ 7-9.

Mr. Valdovinos-Vasquez filed another Motion to Vacate on January 23, 2017 (CP 64-83) and a First Amended Motion and Affidavit to Vacate Conviction on February 6, 2017. CP 140-184. The Court heard oral argument on February 6, 2017. CP 34-75. The Court issued a written Opinion on Motion to Vacate Conviction on March 13, 2017 denying Defendant's motion. CP 188-92. The Court held "that the defendant has failed to meet his burden to establish that his trial counsel provided

ineffective assistance of counsel under Padilla, Sandoval and Strickland.” CP 192. The Court also concluded that defendant failed to establish any basis for relief from the Judgment and Sentence under CrR 7.8. CP 192. The Court declined to rule on “the prejudice prong.” CP 192.

The Court issued an Order Denying Motion to Vacate Conviction on March 27, 2017. CP 202-03. This Order incorporated the March 13, 2017 Opinion on Motion to Vacate Conviction and found that “defendant decided to enter a guilty plea and be sentenced rather than heed the advice of his trial attorney to continue the matter in order to consult with Mr. De Young about the potential immigration impacts of pleading guilty.” CP 202. The Order concluded that “[u]nder the totality of the circumstances, trial counsel provided effective assistance of counsel.” CP 203. Defendant timely appealed the Order.

IV. LAW AND ARGUMENT

A. Standard of Review.

To establish that a plea was involuntary or unintelligent because of counsel’s inadequate advice, the defendant has the burden to establish that (1) his attorney’s performance was objectively unreasonable and (2) the deficient performance prejudiced the defendant. State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011), *citing* Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). An attorney’s performance is deficient if it falls “below an objective standard of

reasonableness based on consideration of all the circumstances.” State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Deficient performance prejudices a defendant if there is a “reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Ineffective assistance of counsel is a mixed question of law and fact that appellate courts review de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

In this action, Mr. Valdovinos-Vasquez’s trial counsel failed to meet the constitutional standard of competence for advice about immigration consequences. Mr. Valdovinos-Vasquez would not have agreed to the plea but for his trial counsel’s deficient performance and thus was prejudiced. Therefore, he meets his burden to establish ineffective assistance of counsel and his conviction should be vacated.

B. The Advice of Appellant’s Defense Attorney Did Not Meet the Constitutional Standard of Competence for Advice About the Immigration Consequences of his Guilty Plea.

The Supreme Court of Washington set forth the standard for ineffective assistance of counsel in the plea process in State v. Sandoval:

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. Counsel's faulty advice can render the defendant's guilty plea involuntary or unintelligent. To establish the plea was involuntary or unintelligent because of counsel's inadequate advice, the defendant must satisfy the familiar two-part Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), test for ineffective assistance claims—first,

objectively unreasonable performance, and second, prejudice to the defendant. Ordinary due process analysis does not apply.

171 Wn.2d 163, 169, 249 P.3d 1015 (2011) (citations omitted).

Deportation is “intimately related to the criminal process,” and “recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.” Sandoval, 171 Wn.2d at 170, *quoting* Padilla v. Kentucky, 559 U.S. 356, 365 (2010). Because of deportation’s “close connection to the criminal process,” advice about deportation consequences falls within “the ambit of the Sixth Amendment right to counsel.” Sandoval, 171 Wn.2d at 170, *quoting* Padilla, *supra*. The Sandoval court relied on the Supreme Court’s opinion in Padilla to establish the advice that a constitutionally competent defense attorney is required to give about immigration consequences during the plea process:

Padilla describes the advice that a constitutionally competent defense attorney is required to give about immigration consequences during the plea process. “Immigration law can be complex,” as Padilla recognizes, and so the precise advice required depends on the clarity of the law. If the applicable immigration law “is truly clear” that an offense is deportable, the defense attorney must correctly advise the defendant that pleading guilty to a particular charge would lead to deportation. If “the law is not succinct and straightforward,” counsel must provide only a general warning that “pending criminal charges may carry a risk of adverse immigration consequences.” In other words, even if immigration law does not reveal clearly whether the offense is deportable, competent counsel informs the defendant that deportation is at least possible, along with exclusion, ineligibility for citizenship, and any other adverse immigration consequences. *Padilla* rejected the proposition that only affirmative misadvice about the

deportation consequences of a guilty plea, but not the failure to give such advice, could constitute ineffective assistance of counsel.

Sandoval, 171 Wn.2d at 170 (citations omitted).

1. The relevant immigration law at issue is truly clear about the deportation consequences.

To assess whether Mr. Valdovinos-Vasquez’s trial counsel's advice met constitutional standards set forth in Sandoval, the appellate court must first determine whether the relevant immigration law is truly clear about the deportation consequences. Sandoval, 171 Wn.2d at 170 (citations omitted). The Sandoval court looked to the Supreme Court’s opinion in Padilla to determine whether the relevant immigration law is “truly clear about the deportation consequences”:

Padilla itself is an example of when the deportation consequence is “truly clear.” Id. Jose Padilla pleaded guilty to transporting a significant amount of marijuana in his truck, an offense that was obviously deportable under 8 U.S.C. § 1227(a)(2)(B)(i):

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of ... relating to a controlled substance ..., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is *deportable*.

(Emphasis added.) This statute is “succinct, clear, and explicit in defining the removal consequence for Padilla's conviction.” Padilla, 130 S.Ct. at 1483. By simply “reading the text of the statute,” Padilla's lawyer could determine that a plea of guilty would make Padilla eligible for removal. *Id.*

Sandoval, 171 Wn.2d at 171.

In this action, Mr. Valdovinos-Vasquez and his defense attorney were presented with a last minute charge of possession of a controlled substance. CP 3-5. This offense was “obviously deportable” under 8 U.S.C. § 1227(a)(2)(B)(i) since it would be a violation of a law or regulation relating to a controlled substance. See Sandoval, 171 Wn.2d at 171. Therefore, Appellant’s defense counsel was required to “correctly advise the defendant that pleading guilty to a particular charge **would lead to deportation.**” Sandoval, 171 Wn.2d at 170 (emphasis added). Appellant’s defense counsel failed to advise him that pleading guilty to the drug possession charge would lead to deportation. See VRP p. 22, ll. 2-22. Rather, Mr. Yedinak advised Appellant that “a plea to this additional charge **may adversely affect his immigration status.**” CP 46-47, ¶ 9. In fact, Mr. Yedinak was unsure what the immigration consequences of a guilty plea would be. Mr. Yedinak testified at the December 19, 2016 hearing as follows:

Q: And, to your mind, what are the specific immigration consequences of a drug offense for a non (unintelligible) permanent resident?

A: I think it depends. I’m not sure.

Q: Okay. Did you inform Mr. Valdovinos of the specific consequences of pleading guilty to drug possession?

A: Specific?

Q: Yes.

A: What do you mean by specific?

Q: Did you –

A: Yeah, I informed him that there could be immigration consequences –

Q: Okay.

A: - - but I didn't give him specific what would happen.

Q: Okay. Did you inform him that he would be deported if he pleaded guilty to drug possession?

A: I did not say that to him.

VRP p. 22, ll. 2-22.

Clearly, Appellant's defense counsel failed to "correctly advise the defendant that pleading guilty to a particular charge **would lead to deportation.**" Sandoval, 171 Wn.2d at 170 (emphasis added). Therefore, Appellant was deprived of his Sixth Amendment right to effective assistance of counsel, and his conviction for possession of a controlled substance should be vacated.

2. Appellant was prejudiced by the ineffective assistance of counsel.

An appellant asserting a claim of ineffective assistance of counsel must establish prejudice as a result of the ineffective assistance. Sandoval, 171 Wn.2d at 169. "In satisfying the prejudice prong, a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would

have insisted on going to trial.” Sandoval, 171 Wn.2d at 174–75, quoting In re Pers. Restraint of Riley, 122 Wn.2d 772, 780–81, 863 P.2d 554 (1993). In Sandoval, the court found prejudice where Mr. Sandoval stated in his brief that he would not have accepted the plea and counsel admitted Mr. Sandoval “was very concerned” about the risk of deportation. Sandoval, 171 Wn.2d at 175. The Sandoval court found this to be sufficient to show prejudice even though it was not “rational” that Mr. Sandoval would proceed to trial instead of accepting a plea deal given the disparity in punishment. Id.

The Court of Appeals, Division 3 addressed the issue of prejudice in State v. Martinez:

Here, like in Sandoval, it may not seem rational that Mr. Martinez would refuse a very favorable plea offer, but he claims in his brief he would not have pleaded guilty if he knew deportation would be a consequence (*see* Appellant's Br. at 44) and deportation was a “material factor” according to Mr. Martinez's attorney. CP at 280. The Sandoval court reasons this is sufficient to establish prejudice. Therefore, Mr. Martinez has met both prongs of the Strickland test.

161 Wn. App. 436, 448, 253 P.3d 445 (2011).

As in Sandoval and Martinez, the Appellant in this action has testified that he would not have plead guilty to the drug possession charge had he known the immigration consequences:

This was a mistake that I pleaded to these charges, I want the court to vacate my conviction so that I won't be automatically deported.

CP 38, #8.

But, (Mr. Yedinak) never also told me specifically that this was a different guilty plea than what Mr. De Young had worked on and approved. If he would have actually said that, I would have at least a clue that this was something new and that it could be dangerous. As far as I knew, this was the guilty plea that Mr. De Young had approved and it was safe for me to plead guilty.

CP 62, # 7.

Mr. Valdovinos-Vasquez met his burden to show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty. See Sandoval, 171 Wn.2d at 174-75. Therefore, he has shown the requisite prejudice, and his conviction should be vacated.

C. The Trial Ignored the Sandoval Requirement that the Attorney Must Advise the Defendant that Pleading Guilty to the Drug Possession Charge Would Lead to Deportation.

Washington law clearly required Appellant's attorney to "correctly advise the defendant that pleading guilty to a particular charge **would lead to deportation.**" Sandoval, 171 Wn.2d at 170-71 (emphasis added). It is undisputed that Mr. Valdovinos-Vasquez's defense counsel did not advise him that pleading guilty to the drug possession charge would lead to deportation. Therefore, Mr. Valdovinos-Vasquez was deprived of his Sixth Amendment right to effective assistance of counsel.

The Court's Opinion on Motion to Vacate Conviction ignores the fact that Mr. Yedinak never told Mr. Valdovinos-Vasquez that pleading guilty to the drug possession charge would lead to deportation. CP 188-92. The Court cites various communications and concludes "[f]rom the

totality of the facts it is difficult for the Court to discern how the trial counsel could have been more clear in his advice and warnings to defendant upon learning of the new offer from the State.” CP 191. However, the vague warnings “of the potential adverse immigration consequences of pleading guilty” do not meet the Sandoval requirement of specific advice that pleading guilty to the drug possession charge would lead to deportation. Sandoval, 171 Wn.2d at 170-71. The vague rather than specific warnings did not alert Mr. Valdovinos-Vasquez to the fact that the new charge added to the plea that would result in his deportation. If Mr. Yedinak had given the specific warning that he was legally required to provide, then Mr. Valdovinos-Vasquez would have had the ability to make an informed decision about pleading guilty to the new charge. See CP 62, ¶ 7. Thus, the Court’s Conclusion of Law that “[u]nder the totality of the circumstances, trial counsel provided effective assistance of counsel” conflicts with well-established law and should be reversed. CP 203.

V. CONCLUSION

Based on the forgoing, Appellant Mr. Valdovinos-Vasquez respectfully requests the Court to vacate his conviction and remand the drug possession charge to the trial court.

RESPECTFULLY SUBMITTED this 12th day of October, 2017.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 4th day of October, 2017, a true and correct copy of the foregoing document was served by the method indicated below and addressed to the following:

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	Facsimile	<input type="checkbox"/>
	Email	<input type="checkbox"/>
Client: Victor Valdovinos-Vazquez	COA Notification	<input type="checkbox"/>
P.O. Box 158	U.S. Mail	<input checked="" type="checkbox"/>
Bridgeport, WA 98813	Facsimile	<input type="checkbox"/>
	Email	<input type="checkbox"/>

DATED this 12th day of October, 2017 at Spokane, Washington.

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